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# Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power To Enforce the Fourteenth Amendment

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# *Bakke, Weber* and *Fullilove*: Benign Discrimination and Congressional Power To Enforce the Fourteenth Amendment†

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The Supreme Court has, in the last three years, been confronted with three separate challenges to race conscious programs intended to increase representation by blacks and other minorities.[1] In *Regents of the University of California v. Bakke*,[2] the problem was admission to higher education; in *United Steelworkers v. Weber*,[3] the challenge involved a craft apprenticeship program; and in *Fullilove v. Klutznick*,[4] the federally imposed minority contractor requirements for public works projects were in issue.[5] The Court upheld the permissibility of benign discrimination in each instance,[6] yet failed to provide any consistent or coherent doctrinal basis for doing so. *Bakke's* plurality opinion and sharply divergent concurring opinions make derivation of a rule or theory impossible. In *Weber*, the Court avoided the constitutional inquiry altogether, finding an absence of the requisite state action,[7] and based its holding on a narrow and somewhat unique process of statutory construction.[8] Finally, in *Fullilove*, the Court performed a remarkable turnabout, sustaining the validity of the congressionally imposed plan, not under the elaborate two-tier equal protection analysis which had previously been applied to both state and federal actions, but on the basis of a theory of congressional enforcement power[9] that had lain dormant since *Katzenbach v. Morgan*.[10]

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[1] Hereinafter the use of such programs will be referred to as "benign discrimination."

[2] 438 U.S. 265 (1978).

[3] 443 U.S. 193 (1979).

[4] 100 S. Ct. 2758 (1980).

[5] *Id.* at 2762.

[6] Although the Court in *Bakke* held invalid the particular program challenged, the majority clearly acknowledged the possible validity of other programs of benign discrimination. 438 U.S. at 320.

[7] 443 U.S. at 200.

[8] 443 U.S. at 219-55 (Rehnquist, J., dissenting).

[9] 100 S. Ct. at 2774-75.

[10] 384 U.S. 641 (1966).

This article examines the scope of Congress' power under section 5 of the fourteenth amendment.[11] Section 5 was generally ignored by both Congress and the Court for more than eighty years, from the *Civil Rights Cases*[12] until *Morgan. Fullilove* only suggests the possible import of the section 5 power for the issue of benign discrimination. This article proposes an analytical framework in which Congress' power under section 5 of the fourteenth amendment largely determines the substantive content of the equal protection clause as applied to benign discrimination. It also argues that the fifth amendment due process limitation on Congress' power is necessarily different from, and more flexible than, the equal protection limitation upon state action.[13] This examination of the fourteenth amendment is from a structural perspective, that is, primarily as a redistribution of power among Congress, the Court and the states.[14]

## THE CONFUSION BETWEEN THE FOURTEENTH AND FIFTH AMENDMENTS' "EQUAL PROTECTION" GUARANTEES

The interpretation of the equal protection clause of section 1 of the fourteenth amendment has changed radically in the one hundred years of its development.[15] Perhaps the most significant early construction of the clause came in *Plessy v. Ferguson.*[16] The plaintiffs in that case challenged a state statute requiring separate, segregated railway carriages for whites and blacks. In a seven to one decision, the Supreme Court held that the requirement of separate facilities was a reasonable regulation in view of the "usages, customs, and traditions of the people ... and the preservation of the public peace and good order."[17] The first Justice Harlan, in one of his most celebrated opinions, bitterly denounced the majority opinion: "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public

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[11] U.S. CONST. amend. XIV, § 5.

[12] 109 U.S. 3 (1883).

[13] The concepts of equal protection and due process have been confused even within the context of the fourteenth amendment alone. *See* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977). Professor Karst supports the Court's equation of the fifth and fourteenth amendments' equal protection guarantees. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977). This article finds that position untenable.

[14] *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[15] A full account of the twists and turns which have taken place in the clause's interpretation would require a separate volume, and is quite beyond the scope of this article. Only a few of the most essential aspects of its interpretation will be addressed here. For an especially enlightening treatment of the doctrine of equal protection, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-1, -57 (1978).

[16] 163 U.S. 537 (1896).

[17] *Id.* at 550.

authority to know the race of those entitled to be protected in the enjoyment of such rights."[18] He went on to declare that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . all citizens are equal before the law."[19] Despite this challenge from Harlan's per se approach, the Court adopted a reasonableness standard for reviewing state regulation.

Almost half a century later, the Court revised its standard for racial classification in the Japanese war-time cases.[20] Decided against a background of public hysteria, the cases moved well beyond the simple reasonableness standard of *Plessy*, but nevertheless sustained the racially discriminatory measures on the basis of an apparently more rigorous "strict scrutiny" standard which required that the state have a compelling interest which justified the regulation.[21] The question that arose from a comparison of *Plessy* and the Japanese war-time cases concerned when the strict scrutiny or compelling interest standard was necessary and when the minimal reasonableness standard was appropriate. The answer evolved through a series of decisions, and was made explicit in *Shapiro v. Thompson*.[22] The "two-tier" equal protection test which was stated in *Shapiro* required the application of the strict scrutiny test whenever a classification impinged either upon a "suspect class" or upon a "fundamental right."[23]

As the two-tier test emerged as the dominant mode of equal protection analysis, it became so rigid in its application that strict scrutiny practically insured the invalidation of a challenged classification, while the lower rational basis level of scrutiny virtually insured that a classification would be sustained.[24] Although there were inevitable problems in defining which classifications were suspect and which rights were fundamental in two-tier analysis, there was little dispute about the application of strict scrutiny to overt racial classifications. The problem frequently encountered in race litigation was that of determining which ostensibly neutral methods of classification, such as test results[25] or zoning decisions,[26] were in fact racially discriminatory.

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[18] *Id.* at 554 (Harlan, J., dissenting).

[19] *Id.* at 559 (Harlan, J., dissenting).

[20] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

[21] The Court in Korematsu v. United States, 323 U.S. 214, 216 (1944), stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."

[22] 394 U.S. 618 (1969).

[23] *Id.* at 629.

[24] *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972).

[25] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

[26] *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

Consensus on the application of the two-tier test began to crumble in the face of two separate challenges. The first resulted from the increasingly perceived need for an intermediate standard of review for a variety of nonracial classifications.[27] The second was the recent phenomenon of benign discrimination in favor of racial minorities who had traditionally been the victims of discrimination.[28] As a verbal formulation, the two-tier test required that all racial classifications be treated equally, that is, subjected to strict scrutiny. This was the approach of Justice Douglas in *DeFunis v. Odegaard*;[29] he argued against all racial classifications, whether benign or invidious. By the time *Bakke* was decided, however, the only Justice reaching the fourteenth amendment issue who was willing to assess benign discrimination by the compelling state interest standard was Justice Powell, who nevertheless found such an interest in the context of higher education.[30]

While the Court was bridging the gap between the "separate but equal" doctrine of *Plessy* and the two-tier model of *Shapiro*, it was also expanding the due process requirements of the fifth amendment to include an equal protection component. This expansion began in *Bolling v. Sharpe*.[31] In *Bolling*, a companion case to *Brown v. Board of Education*,[32] a unanimous Court struck down the requirement of segregated schools in the District of Columbia. Recognizing that the fourteenth amendment could not serve as a limitation upon the federal government, Chief Justice Warren outlined the relationships of the fifth and fourteenth amendments:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[33]

Despite the cautious approach to due process analysis called for by

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[27] *See* L. TRIBE, *supra* note 15, § 16-25.

[28] *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974) (University of Washington Law School admissions policy challenged as disproportionately favoring minority applicants).

[29] *Id.* at 320-44 (Douglas, J., dissenting).

[30] 438 U.S. at 291, 314 (Powell, J.) (found interest of diversity in student body compelling in context of university admissions program; nevertheless, rejected program for seeking to achieve diversity by using explicit racial classifications).

[31] 347 U.S. 497 (1954).

[32] 347 U.S. 483 (1954).

[33] 347 U.S. at 499.

Chief Justice Warren, fifteen years later in *Shapiro v. Thompson*[34] the majority of the Court failed to recognize any significant distinction between limitations on Congress and limitations on state action. *Shapiro* concerned the imposition of residency requirements for welfare eligibility in the states and in the District of Columbia, requirements which had allegedly been authorized by Congress in section 402(b) of the Social Security Act.[35] Justice Brennan, writing for the majority, ruled: first, that the state residency requirements impinged upon the fundamental right to travel and were not supported by a compelling state interest;[36] second, that "Congress may not authorize the States to violate the Equal Protection Clause";[37] and third, that the District of Columbia's residency requirement was a "discrimination . . . so unjustifiable as to be violative of due process."[38] Although Justice Brennan noted the *Bolling* distinction between due process and equal protection, he eliminated its significance. Chief Justice Warren, in dissent, sharply attacked the majority for departing from the reasoning of *Bolling*.[39] He concluded that Congress' plenary power to regulate commerce was sufficient to permit its regulation of interstate travel, as long as it did not create wholly arbitrary classifications or racial discrimination.[40]

If, in *Shapiro*, the distinction between equal protection and due process was strained beyond recognition, in *Weinberger v. Wiesenfeld*[41] it was dumped overboard in a flourish of questionable dicta. In a footnote, Justice Brennan announced: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[42] While Justice Brennan may have been correct in summarizing the trend toward the obliteration of the distinction, his presentation of it as a *fait accompli* was hardly justifiable. He suggested no basis for this presumed identity between the two concepts, nor could he. Even the most rudimentary analysis of the history, language or purpose of the two amendments reveals fundamental differences.

Historically, the framers of the fourteenth amendment can hardly be said to have believed that the fifth amendment due process limitation upon Congress was a sufficient prohibition against racial discrimination.[43] Their perception of a distinction is the only plausible

[34] 394 U.S. 618 (1969).
[35] 42 U.S.C. § 602(b) (1976).
[36] 394 U.S. at 638.
[37] *Id.* at 641.
[38] *Id.* at 642 (quoting Schneider v. Rusk, 377 U.S. 163, 168 (1964)).
[39] 394 U.S. at 652-53 (Warren, C.J., dissenting).
[40] *Id.* at 653-54 (Warren, C.J., dissenting).
[41] 420 U.S. 636 (1975).
[42] *Id.* at 638 n.2.
[43] *See* L. TRIBE, *supra* note 15, § 7-2, at 417. For excellent general sources on the history of the adoption of the fourteenth amendment, see C. FAIRMAN, RECONSTRUCTION AND RE-

explanation for having included both due process and equal protection clauses in the fourteenth amendment. Moreover, any interpretation of the two concepts as identical renders one portion of the fourteenth amendment superfluous. Finally, there is Chief Justice Warren's denunciation of the majority in *Shapiro* for misreading his opinion in *Bolling* and treating due process and equal protection as the same.[44] Justice Warren's *Bolling* opinion correctly stated that the fifth amendment inquiry is whether a discrimination is "so unjustifiable as to be violative of due process."[45]

This inquiry is the ultimate safeguard against arbitrary congressional action. It is not the elaborate safeguard provided by the fourteenth amendment against state action, but neither is it an empty promise, as *Bolling* illustrates. Since this analysis provides a more flexible standard than that used in reviewing state action, Congress may, theoretically, create classifications or otherwise act in ways foreclosed to the states. From this perspective, section 1 of the fourteenth amendment may subject the states to a strict color-blind standard, as Justice Douglas and the senior Justice Harlan argued,[46] while Congress may be able to require remedial race consciousness. Such congressional actions would be subject only to the flexible standard of judicial review utilized in *M'Culloch v. Maryland*[47] and the due process standard of the fifth amendment.[48] Thus, the controlling principles when Congress exercises its express power to enforce equal protection under section 5 of the fourteenth amendment are the *M'Culloch* standard of judicial review and the fifth amendment.

The separation of the fifth amendment due process guarantee from the fourteenth amendment equal protection guarantee is a necessary first step in any analysis of Congress' power under section 5. An effort to strike a balance between section 1 and section 5 of the fourteenth amendment, which is itself a balance between judicial and legislative power, requires a review of the history of the fourteenth amendment's adoption and its development by the Court, as well as of the social and

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UNION 1270-1389 (1971); H. FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT (1908); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

For a thorough, scholarly history of the fourteenth amendment that reaches conclusions contrary to those reached here, see R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). Mr. Berger concludes that Congress' section 5 power to enforce section 1 derives from the Civil Rights Act of 1866. *Id.* at 229. Professor Perry discusses and rejects Berger's conclusions as well as presenting an extraordinarily insightful definition of the "core" of equal protection. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1023-28, 1069 (1979).

[44] 394 U.S. at 652-53 (Warren, C.J., dissenting).

[45] 347 U.S. at 499.

[46] *See* text accompanying notes 18-19 & 29 *supra*.

[47] 17 U.S. (4 Wheat.) 316 (1819).

[48] *See* text accompanying notes 169-73 *infra*.

political consequences inherent in assigning the issue of benign discrimination to Congress rather than to an *a priori* resolution by the Court.

### *The Adoption of the Fourteenth Amendment*

While it is true that the ultimate validity of any method of constitutional interpretation is not derived solely from the framers' intent, it is, nevertheless, appropriate in this instance to begin with the circumstances surrounding the enactment of the fourteenth amendment. The reason for doing so is not because such an examination will be conclusive, but rather because the fundamental issues raised by an expansive view of Congress' power under section 5 are not new, having roots that extend back to the turmoil of the reconstruction era. The fourteenth amendment was a cornerstone of the radical program of reconstruction.[49]

Although ostensibly a product of the Committee of Fifteen,[50] the amendment was actually the creation of Representative Bingham of Ohio.[51] Bingham, though wholly sympathetic to the Radical Republican program, had voted against the Civil Rights Bill of 1866 because he believed that it was unconstitutional and was not supported by the thirteenth amendment. Accordingly, he sought a further amendment to validate the Civil Rights Bill.[52] Although the other Radicals expressed their belief in the constitutionality of the 1866 Act, they sought to protect the Act's provisions against subsequent legislative repeal.[53] The Committee debated a number of proposals for the amendment, and for some time Bingham was unsuccessful in persuading it to recommend his measure over other proposals. Only after several defeats was he finally successful in gaining approval of his proposed fourteenth amendment in a form which was almost identical to its final wording.[54]

One essential feature of Bingham's plan, and its key divergence from the other numerous proposals considered by the Committee, was his express grant of an enforcement power to Congress.[55] Indeed, Bingham's earliest draft consisted of a single sentence which declared:

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[49] *See* H. FLACK, *supra* note 43, at 55-139.

[50] The Committee of Fifteen was the joint House-Senate committee specially entrusted with the duty of developing and proposing a plan of reconstruction. *See* C. FAIRMAN, *supra* note 43, at 1274-75; H. FLACK, *supra* note 43, at 79.

[51] *See* C. FAIRMAN, *supra* note 43, at 1274-75; H. FLACK, *supra* note 43, at 79.

[52] H. FLACK, *supra* note 43, at 30-32.

[53] *Id.* at 65.

[54] The only significant change was the addition of the citizenship definition in section 1. *See* C. FAIRMAN, *supra* note 43, at 1270-81; H. FLACK, *supra* note 43, at 55-68.

[55] C. FAIRMAN, *supra* note 43, at 1280.

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[56]

Bingham's focus was clearly on the expansion of Congress' power to regulate the assimilation of the freedmen into society and to invalidate the "Black codes" which had been adopted in the South to isolate and suppress the former slaves. In addition, Bingham sought to provide a constitutional basis for protecting fundamental rights against state infringement.[57]

Opponents of Bingham's measure were quick to perceive it as opening the door to a fundamental alteration of the relationship between the federal government and the states.[58] Although other aspects of the amendment were debated and questioned,[59] it is clear that, from its conception, a central issue in the adoption and interpretation of the fourteenth amendment was the scope of the powers it granted to Congress and the impact of those powers on the federalist system.

An exhaustive study of the framers' intent for the scope of section 5 is unnecessary here. What is important is that extraordinarily broad interpretations of Congress' section 5 power were articulated by the bill's proponents[60] and opponents,[61] as well as scholarly commentators.[62] Senator Howard of Michigan, who introduced the amendment in the Senate, termed it "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees [the privileges and immunities of citizens of the United States], a power not found in the Constitution."[63] Howard's interpretation of the section was not challenged; rather, the minority Democrats questioned the wisdom of the provision in permitting "that Congress might invade the jurisdiction of

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[56] CONG. GLOBE, 39th Cong., 1st Sess. 1054 (1865).

[57] H. FLACK, *supra* note 43, at 59, 92, 96. This purpose is, of course, central to the controversy over whether the fourteenth amendment wholly or selectively incorporates the Bill of Rights. That question is not relevant to this article and has been treated exhaustively elsewhere. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (arguing against total incorporation).

[58] For example, Representative Hale of New York stated: "I submit that it is in effect a provision under which all State legislation, in its code of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead." CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866). *See* notes 194-218 & accompanying text *infra*.

[59] One such debate concerned whether civil rights included political rights. *See* H. FLACK, *supra* note 43, at 79.

[60] *See id.* at 138.

[61] *See id.* at 136-37.

[62] *See id.* at 138-39.

[63] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

the States, rob them of their reserved rights, and crown the Federal Government with absolute and despotic power."[64]

Congress did not wait long before exercising its power under section 5. The 41st Congress passed the Enforcement Act of May 31, 1870,[65] which prohibited, *inter alia*, private conspiracies to prevent any citizen from exercising "any right or privilege granted or secured to him by the Constitution or laws of the United States."[66] The Enforcement Act also re-enacted the Civil Rights Bill of 1866. During the next term, the 42d Congress passed a further enforcement act providing civil and criminal liability for depriving any person of the rights, privileges or immunities secured by the Constitution.[67] Here the debates very clearly centered on whether or not the fourteenth amendment supported such an intrusion by the federal government into areas formerly the province of the states.[68] Finally, of course, the 43d Congress passed the Civil Rights Act of 1875.[69]

Throughout the period immediately following the enactment of the fourteenth amendment, then, the debate over the scope of Congress' power under it continued, with those favoring an expansive view in the majority. Led by many former members of the Committee of Fifteen and the chief proponents of the amendment itself, Congress repeatedly adopted a very broad view of its own powers. The legislation passed in those years was affirmative in nature, was not predicated on state action and extended into areas which had been controlled by the states prior to Reconstruction. Although, as always, the Supreme Court was called upon for the last word,[70] the early congressional history of the fourteenth amendment establishes that from the outset it was seen as holding out the possibility of an unprecedented role for the federal government in protecting civil rights and privileges from both state and private infringement.

### *Section 5 Before the Court*

The scope of Congress' power under section 5 of the fourteenth amendment was considered at length by the Supreme Court in the years immediately following the amendment's enactment. The first major decision in which it was construed was the *Slaughter-House*

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[64] *Id.* at 2940 (remarks of Sen. Hendricks of Indiana).
[65] Ch. 114, 16 Stat. 140 (1870).
[66] *Id.* § 6, 16 Stat. 141.
[67] An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, 17 Stat. 13 (1871).
[68] H. FLACK, *supra* note 43, at 246-49.
[69] Ch. 114, 18 Stat. 335 (1875) (repealed 1948).
[70] *See* notes 81-90 & accompanying text *infra*.

*Cases*.[71] The issue before the Court was the constitutionality of a Louisiana statute which granted a monopoly franchise in the operation of slaughter-house facilities, a statute which the petitioners alleged abridged their privileges and immunities as citizens of the United States, denied them equal protection and deprived them of property without due process.[72]

Justice Miller, writing for the Court, had little difficulty in dismissing all of the petitioners' claims. The privileges and immunities protected by the fourteenth amendment, he wrote, were those fundamental rights of national citizenship which were derived from the "Federal government, its *national* character, its Constitution, or its laws."[73] Clearly, Justice Miller concluded, the right to engage in a particular trade derived from state citizenship, and was, therefore, under state control.[74] Furthermore, he declared, the commandment of equal protection applied to racial, not commercial, classifications, and the regulation of trade could not be considered a deprivation of property.[75]

Although the issue of Congress' power was not before the Court, the fears expressed by those who had opposed the amendment were repeated by Justice Miller in an extended discussion in dicta. In reasoning that the privileges and immunities protected by the fourteenth amendment were those of a national character and that those traditionally within the dominion of the states were unaffected, Justice Miller relied heavily on what he foresaw as the disastrous consequence of a contrary interpretation:

> For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. . . . [T]hese consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions [that] the effect is to fetter and degrade the State governments by subjecting them to the control of Congress. . . . [I]t radically changes the whole theory of the relations of the State and Federal governments . . . .[76]

This extended defense of federalism is noteworthy for its virtual assumption of an expansive view of section 5; Justice Miller hoped to avoid the consequences of section 5 by limiting the import of section 1. In limiting the import of the privileges and immunities clause of section

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[71] 83 U.S. (16 Wall.) 36 (1873).
[72] *Id.* at 66.
[73] *Id.* at 79 (emphasis added).
[74] *Id.* at 80.
[75] *Id.* at 81.
[76] *Id.* at 78.

1, his express fear was the power of Congress under section 5 to enforce a more broadly construed section 1.

Six years after the *Slaughter-House Cases*, legislation based on section 5 required the Court to construe that section specifically for the first time in *Ex Parte Virginia*.[77] At issue was the constitutionality of a section of the Civil Rights Act of 1875 which provided criminal penalties for excluding from, or failing to summon for, jury duty any citizen on account of the citizen's race, color or previous condition of servitude.[78] The Court, in upholding the statute, dwelt at some length upon the general nature and purpose of the Reconstruction amendments and the congressional enforcement power:

> They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. . . . [The right to an impartial jury trial and immunity from discrimination in jury selection] as the fifth section of the amendment expressly ordains may be enforced by Congress by means of appropriate legislation.
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> All of the Amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions. . . . It is the power of Congress which has been enlarged . . . .[79]

The Court concluded that, in view of this expansion of its power, Congress could pass "[w]hatever legislation is appropriate, that is, adapted to carry out the objectives the amendments have in view."[80]

The Supreme Court's narrow interpretation of section 1 in the *Slaughter-House Cases* and its broad interpretation of section 5 in *Ex Parte Virginia* created an obvious tension which the Court was soon forced to resolve. In the *Civil Rights Cases*,[81] the issue was how far Congress could go in exercising the mandate granted by *Ex Parte Virginia*; that controversy required the Court, again, to review the Civil Rights Act of 1875, the capstone on the Reconstruction. At issue in the *Civil Rights Cases* was the constitutionality of the first two sections of the Act which, taken together, provided penalties for any person who denied accommodations in inns, theaters and the like to any other person "except for reasons by law applicable to citizens of every race and color."[82] The Court proceeded directly to the issue of whether the fourteenth amendment authorized Congress to enact such provisions. Justice Bradley, writing for the Court, succeeded in narrowing the im-

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[77] 100 U.S. 339 (1879).
[78] Ch. 114, § 4, 18 Stat. 336 (1875) (repealed 1948).
[79] 100 U.S. at 345.
[80] *Id.* at 345-46.
[81] 109 U.S. 3 (1883).
[82] *Id.* at 9.

port of section 5 by limiting its application to cases involving the state action which he found to be necessary under section 1.[83] In other words, while *Ex Parte Virginia* conceded to Congress a plenary power to promote the objectives of the amendment, Justice Bradley found those objectives were limited to the protection of citizens against state action. An act of Congress which was not predicated upon some state action, either actual or threatened, Justice Bradley reasoned, could not be sustained.[84] Thus the Court succeeded in curtailing the threat to federalism which some had perceived in the fourteenth amendment since its inception. Section 5 could not support legislation aimed directly at individual, private conduct; that conduct was left to state, not federal, control.[85]

The implication of reading a state action requirement into section 1, and also, therefore, into section 5, was vigorously disputed by the first Justice Harlan in dissent.[86] In an opinion which is remarkably prescient in its analysis, foreshadowing views adopted eighty years later, Justice Harlan focused on the uniqueness of the grant of enforcement power in the constitutional scheme: "The Fourteenth Amendment presents the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the states."[87] Furthermore, Harlan reasoned, absent section 5, the courts would clearly have had sufficient authority to strike down state actions which contravened the prohibitions of section 1.[88] He concluded that if section 5 were to be accorded its necessary meaning, it must permit Congress to do more, to enact legislation of a primary, direct character which would protect the former slaves from discrimination.[89]

The *Civil Rights Cases* seemed to foreclose any extensive role for Congress in the area of civil rights, leaving it, instead, in the position of a mere auxiliary police force against discriminatory state action. However, Justice Harlan's section 5 dissent would ultimately be vindicated in the same way as would his better-known *Plessy v. Ferguson* dissent.[90] The *Civil Rights Cases*, like *Plessy*, were not overruled directly but, after an even longer hiatus, the narrow reading of section 5 was quietly abandoned.

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[83] *Id.* at 11.

[84] *Id.*

[85] Justice Bradley noted that the fourteenth amendment did "not invest Congress with powers to legislate upon subjects which are within the domain of State legislation; . . . [or] authorize Congress to create a code of municipal law for the regulation of private rights." *Id.* This diatribe of Justice Bradley exactly echoed the fears of the fourteenth amendment's congressional opponents, *see* note 58 *supra*, and foreshadowed the critics of the decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), *see* text accompanying notes 120-29.

[86] 109 U.S. at 26 (Harlan, J., dissenting).

[87] *Id.* at 45 (Harlan, J., dissenting).

[88] *Id.* at 46 (Harlan, J., dissenting).

[89] *Id.* at 50-51 (Harlan, J., dissenting).

[90] 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

## The Voting Rights Cases[91]

The Voting Rights Act of 1965[92] produced a flurry of litigation which brought Congress' power to enforce the Reconstruction amendments before the Court for the first time in almost a century. A series of opinions issued in the fall term of 1965 resulted in a clear victory for an expansive interpretation of section 5. *Ex Parte Virginia*[93] was thoroughly vindicated and the continuing validity of the *Civil Rights Cases* was greatly undermined. Although the decisions in *South Carolina v. Katzenbach*,[94] *United States v. Guest*[95] and *Katzenbach v. Morgan*[96] all provoked controversy and left some doubt as to their precise scope,[97] the tide had clearly turned; the Court conceded Congress a role in the enforcement of civil rights much greater than that of simply standing guard against clearly prohibited state statutes.

The first challenge to the Voting Rights Act came in *South Carolina v. Katzenbach*. The contested provisions, which essentially were founded

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[91] There are numerous scholarly treatments of the voting rights cases. For representative examples of the major categories of response to the cases, see Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 226-39 (1971); Nichol, *An Examination of Congressional Powers Under § 5 of the 14th Amendment*, 52 NOTRE DAME LAW. 175 (1976); Comment, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 CALIF. L. REV. 293 (1967).

Of the above commentaries, Professor Cox's foreword is perhaps the most comprehensive and authoritative review. Professor Cohen puts forward the most interesting suggested analysis of the doctrine in Katzenbach v. Morgan, 384 U.S. 641 (1966), that the appropriate question is federalism. Cohen, *supra*, at 618-19. Cohen thus posits that Congress can enact any standard on the federal level which would be legitimate on the state level, limited only by such specific constitutional restrictions as the Bill of Rights. *Id.* Cohen rejects the jurisdictional approach taken by this article on the ground that the "margin," as Cohen labels it, or "penumbra," as this article labels it, may be difficult to define in some cases. *Id.* While the penumbra may be difficult to define, it is, on the whole, doctrinally less troublesome than Cohen's approach. While Cohen provides a very clear answer to the question of the scope of Congress' power, he provides no answer at all to the more pressing problem of equal protection standards in general. To conclude, as Professor Cohen does, that Congress may draw whatever line a state might, begs the question of what lines the state might draw. Furthermore, this line of reasoning ignores what the fourteenth amendment on its face implies: that Congress may draw some lines that the state may not, as is developed more fully below. *See* notes 240-44 & accompanying text *infra*.

[92] Pub. L. No. 89-110, 79 Stat. 437 (1965) (current version at 42 U.S.C. §§ 1971, 1973-1973p (1976)).

[93] 100 U.S. 339 (1879).

[94] 383 U.S. 301 (1966).

[95] 383 U.S. 745 (1966).

[96] 384 U.S. 641 (1966).

[97] *See* Bickel, *supra* note 91; Cohen, *supra* note 91; Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 226-39 (1971); Nichol, *supra* note 91; Comment, *supra* note 91.

on section 2 of the fifteenth amendment,[98] rather than section 5 of the fourteenth, set up a comprehensive program for preventing discrimination in voter qualification procedures. Section 4(a)[99] prohibited the use of voting tests or devices unless approved by the district court in any state in which, under section 4(b),[100] such tests had previously been maintained and less than fifty percent of the persons of voting age were registered or had voted in the 1964 presidential election. South Carolina challenged the Act as an invasion of the state's inherent power to determine voter qualifications and election procedures.

Chief Justice Warren, writing for a nearly unanimous court, relied upon the broad, flexible standard of *M'Culloch v. Maryland*[101] and the equally open language of *Ex Parte Virginia*[102] to uphold the challenged provisions, and rejected the argument that "Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the Courts."[103] Instead, the Chief Justice, quoting *Gibbons v. Ogden*,[104] concluded that the power was complete, plenary and limited only by such proscriptions as are found in the Constitution.[105]

Justice Black, dissenting in part,[106] objected to that portion of the Act which required states within the limitation of sections 4(a) and 4(b) to seek the Attorney General's approval before changing their voting procedures.[107] Justice Black's dissent is noteworthy because it illustrates how far the other eight members of the Court were willing to go in rejecting the rationale underlying the *Slaughter-House Cases* and the *Civil Rights Cases*. Justice Black saw this particular provision as a dangerous departure from the basic republican, federal system established by the Constitution.[108] While otherwise conceding the constitutionality of the act under the *M'Culloch* test, he felt that this procedure which compelled states to seek federal approval before acting to regulate their internal affairs ran afoul of another provision of *M'Culloch* which requires that the means adopted by Congress be otherwise consistent "with the letter and spirit of the Constitution."[109] Justice

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[98] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (1965) (statement of purpose).

[99] *Id.* § 4(a), 79 Stat. 439 (current version at 42 U.S.C. § 1973b(a) (1976)).

[100] *Id.* § 4(b), 79 Stat. 439 (current version at 42 U.S.C. § 1973b(b) (1976)).

[101] 17 U.S. (4 Wheat.) 316 (1819), *cited at* 383 U.S. at 326.

[102] 100 U.S. 339 (1879), *cited at* 383 U.S. at 327.

[103] 383 U.S. at 327.

[104] 22 U.S. (9 Wheat.) 1 (1824).

[105] 383 U.S. at 327.

[106] 383 U.S. at 355 (Black, J., dissenting in part).

[107] *Id.* at 356-57 (Black, J., dissenting in part).

[108] *Id.* at 358-60 (Black, J., dissenting in part).

[109] *Id.* at 358 (Black, J., dissenting in part) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) at 421) (emphasis omitted).

Black's concern is strikingly reminiscent of the reasoning of Justices Miller and Bradley in the *Slaughter-House* and *Civil Rights Cases.*[110] That Justice Black was alone in voicing this concern cleared the way for the more sweeping changes announced that same term in *Guest* and *Morgan.*

In *United States v. Guest,*[111] the statute in question was not the Voting Rights Act, but rather was a statute which provided criminal penalties for conspiracies to injure or oppress "any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or Laws of the United States."[112] A five count indictment alleged a conspiracy by private citizens to interfere with various rights of blacks, including the right to equal access to public facilities and the right to travel interstate.[113] The Court held that both were rights secured by the Constitution and were properly within the scope of the statute, and that therefore the indictment could stand.[114]

For the purposes of this article, the concurring opinions of Justices Clark[115] and Brennan[116] are far more important than the opinion of the Court. Both concurrences addressed the section 5 question which underlies the interpretation of the statute, and which the opinion of the Court skirted. Justice Clark's opinion flatly declared: "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."[117] Justice Brennan's opinion was even stronger, expressly rejecting the *Civil Rights Cases'* interpretation of Congress' section 5 power as limited to legislation to correct prohibited state action: "I do not accept—and a majority of the Court today rejects—this interpretation of § 5."[118]

*South Carolina v. Katzenbach* and *United States v. Guest* indicated that the Court had moved toward an interpretation of Congress' section 5 power far broader than any the post-Civil War Court would have been

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[110] *Compare* South Carolina v. Katzenbach, 383 U.S. at 360 (Black, J., dissenting in part) ("A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country."), *with* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873) ("Was it the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights . . . from the States to the Federal government?"), *and* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (the fourteenth amendment "does not invest Congress with powers to legislate upon subjects which are within the domain of State legislation").

[111] 383 U.S. 745 (1966).

[112] 18 U.S.C. § 241 (1976).

[113] 383 U.S. at 747 n.1.

[114] *Id.* at 760.

[115] *Id.* at 761-62 (Clark, J., concurring).

[116] *Id.* at 774-86 (Brennan, J., concurring & dissenting in part).

[117] *Id.* at 762 (Clark, J., concurring).

[118] *Id.* at 783 (Brennan, J., concurring & dissenting in part).

willing to concede. The real test, however, was the challenge to section 4(e) of the Voting Rights Act[119] brought in *Katzenbach v. Morgan*.[120] Section 4(e), unlike the provisions of the Act examined in *South Carolina*, was expressly grounded on the fourteenth, rather than the fifteenth, amendment. The section provided that no person who had completed sixth grade in a Puerto Rican ("American-flag") school could be denied the right to vote because of illiteracy in English.[121] Registered voters of New York, where such literacy was required, challenged the constitutionality of the Act. The Court, with Justices Harlan and Stewart dissenting, held that the provision was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment."[122]

Several aspects of Justice Brennan's majority opinion are noteworthy. First, he relied on the broad language of *Ex Parte Virginia* for the proposition that it was the power of Congress which had been expanded,[123] and he stressed that the appropriate standard of review for Congress' actions under section 5 is the broad standard of *M'Culloch*.[124] More importantly, Justice Brennan stated that the congressional determination as to the propriety of the literacy test took precedence over previous independent applications of the equal protection clause by the Court.[125] Thus, for the first time, the Court not only espoused a broad view of Congress' section 5 power, but also indicated that actions of Congress under section 5 are entitled to deference and, in appropriate cases, could go beyond what the Court might require in its own application of section 1.

Justice Brennan was certainly aware of the extraordinary import of the position, if only because his departure from traditional concepts was addressed by Justice Harlan's dissent.[126] Justice Brennan responded to Justice Harlan's dissent in a footnote which became the source of considerable controversy, asserting that Congress could not dilute the equal protection decisions of the Court: "Congress' power under § 5 is

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[119] Pub. L. No. 89-110, tit. I, § 4(e), 79 Stat. 439 (1965) (current version at 42 U.S.C. § 1973b(e) (1976)).

[120] 384 U.S. 641 (1966).

[121] Pub. L. No. 89-110, § 4(e)(1), 79 Stat. 439 (1965) (current version at 42 U.S.C. 1973b(e)(1) (1976)).

[122] 384 U.S. at 646.

[123] *Id.* at 648.

[124] *Id.* at 650.

[125] Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.

*Id.* at 649-50.

[126] *Id.* at 659-71 (Harlan, J., dissenting).

limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[127] Justice Brennan concluded his section 5 analysis by suggesting that Congress had the power, traditionally exercised by the judiciary, to weigh the considerations opposing federal intrusion against the benefits to be gained.[128]

Justice Harlan, in dissent, went to the heart of the issue, charging:

> [T]he Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature.
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> . . . Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs. . . . But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the § 5 power into play at all.[129]

Obviously, Justice Harlan was determined to resist the majority's *sub silentio* overruling of the *Civil Rights Cases* in *Guest* and *Morgan*. For Justice Harlan, section 5 might be a unique element in the constitutional scheme, but it was not a radical section in the same sense as section 1.

*Morgan* was a watershed in the interpretation of section 5. It apparently freed Congress to legislate affirmatively in areas of traditional state concern without regard to whether existing state action independently violated section 1 of the fourteenth amendment. It was inevitable that some limitations would be imposed upon Justice Brennan's opinion. These limitations emerged several years later in *Oregon v. Mitchell*.[130] *Mitchell* was the anti-climactic curtain call for the voting rights cases, involving the 1970 amendments to the Voting Rights Act.[131] The amendments lowered the voting age to eighteen for both federal and state elections,[132] banned the use of literacy tests for voter qualification[133] and prohibited the states from imposing any residency requirements for voting in federal elections.[134]

As a result of the breakup of the Warren Court, with Justices Warren, Fortas and Clark being replaced by Justices Burger, Blackmun and Marshall, the Court in *Mitchell* failed to reach a majority opinion. Five opinions were issued, with Justice Black announcing the judgment of

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[127] *Id.* at 651 n.10 (majority opinion).
[128] *Id.* at 653.
[129] *Id.* at 666 (Harlan, J., dissenting) (citations omitted).
[130] 400 U.S. 112 (1970).
[131] Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified at 42 U.S.C. §§ 1973-1973bb (1976)).
[132] *Id.* § 301, 84 Stat. 318 (amended 1975).
[133] *Id.* § 201, 84 Stat. 315 (amended 1975).
[134] *Id.* § 204, 84 Stat. 316 (codified at 42 U.S.C. § 1973 aa-1 (1976)).

the Court.[135] Four Justices would have upheld all three amendments.[136] Justice Black agreed with them as to Congress' power to lower the voting age for federal elections, but disagreed as to its power to lower the voting age for state elections.[137] The other two amendments were upheld nearly unanimously.[138] The issue dividing the Court was whether Congress had the power to set state voting age standards, thereby overturning state classifications unrelated to traditional fourteenth amendment concerns such as race and religion in an area long within the exclusive regulation of the states. Justice Black saw the attempt to lower the voting age for state elections as running afoul of a key limitation on Congress' section 5 power—the restraint of federalism which prevents Congress from stripping the states of their power of self-government.[139]

The opinion of Justice Brennan, joined in by Justices White and Marshall, is in marked contrast to Justice Black's traditional approach to federalism. Justice Brennan saw the question of whether a legislative classification violates equal protection as a factual one, so that "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."[140] The factual nature of equal protection was, for Justice Brennan, the key to Congress' section 5 power. While the Court was institutionally incompetent to substitute its own fact finding and line drawing for that of state legislatures, Congress was clearly competent to do so. Therefore, Congress' determination under section 5 that a distinction between twenty and twenty-one year olds was an impermissible basis for voting qualifications while the distinction between seventeen and eighteen year olds was a valid one, "vests Congress with power to remove the discrimination by appropriate means."[141]

The opposing positions taken by Justices Black and Brennan are especially significant for the analysis proposed here. While Justice Black's reliance on traditional federalism is not supportable given the radical nature of the Reconstruction amendment, Justice Brennan's substitution of fact finding for federalism goes too far. Certainly not every discrimination by the states is subject to Congress' section 5 power. The argument over the age for state voting rights cannot, as Justice Brennan suggested, be compared to a racial requirement for

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[135] 400 U.S. at 117-35.

[136] *Id.* at 280-81 (Brennan, White & Marshall, JJ., dissenting in part); *id.* at 150 (Douglas, J., dissenting in part).

[137] *Compare id.* at 119-24 *with id.* at 124-31 (majority opinion).

[138] *Id.* at 117-18.

[139] *Id.* at 128.

[140] *Id.* at 247 (Brennan, White & Marshall, JJ., dissenting in part) (quoting Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935)).

[141] 400 U.S. at 248 (Brennan, White & Marshall, JJ., dissenting in part).

state office candidacy.[142] While both deal with state elections, the fourteenth amendment was aimed, above all, at racial classifications. This suggests that Congress is free to eliminate racial discrimination, while age discrimination is so removed from the ambit of section 1 that it is not susceptible to Congress' section 5 power.

It was, perhaps, the *Mitchell* Court's failure to reach a consensus on the meaning of *Morgan* and section 5 that dispatched the *Morgan* theory into ten years of relative obscurity. The problems raised by Justice Harlan in *Morgan* and by Justices Black and Stewart in *Mitchell* remained formidable obstacles to further section 5 analysis. Nevertheless, the ratchet problem[143] and the problem of judicial review raised by Justice Harlan[144] are capable of resolution. Furthermore, the federalism concerns of Justices Harlan and Black are more apparent than real.

## *MORGAN* AND *GUEST*

### *The Ratchet Problem and Judicial Review*

Justice Harlan's dissent in *Morgan* had two themes: Congress' power to dilute the guarantees of section 1 and the principle of judicial review.[145] The former, sometimes referred to as the "ratchet problem,"[146] criticizes Justice Brennan's deference to congressional interpretation of the fourteenth amendment as unsheathing a two-edged sword: if the Court must defer to Congress when Congress interprets the fourteenth amendment more expansively than the Court, why should not the Court also defer when Congress attempts to narrow the protection of the amendment?[147] Certainly Justice Brennan provides no basis for his assurance that Congress may "enforce" but not "restrict, abrogate, or dilute" the guarantees of section 1.[148] Justice Harlan was correct; the conclusion is logically inescapable that if Congress can define the substantive scope of the amendment it can dilute the equal protection decisions of the Court. However, partial support for Justice Brennan's position may be drawn from a jurisprudential analysis of section 5's central term—"enforce."

The Reconstruction amendments[149] are a unique grant of "enforcement" power to Congress. The separation of powers conception

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[142] *Id.* at 250-51 (Brennan, White & Marshall, JJ., dissenting in part).
[143] *See* text accompanying note 146 *infra.*
[144] 384 U.S. at 667-68 (Harlan, J., dissenting).
[145] *Id.* (Harlan, J., dissenting).
[146] *See* Cohen, *supra* note 91, at 606.
[147] 384 U.S. at 667-68 (Harlan, J., dissenting).
[148] *Id.* at 651-52 n.10 (majority opinion).
[149] U.S. CONST. amends. XIII, XIV, & XV.

dominating early constitutional thought[150] gave the enforcement power to the executive, the legislative power to the Congress and the judicial or interpretive power to the Court.[151] The Reconstruction amendments were a radical depature from this structure. *Ex Parte Virginia* recognized: "It is not said the *judicial power* of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. . . . It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation."[152] Given the historical context, it is perfectly plausible that Congress intended to grant itself unprecedented power in the area of civil rights, rather than trusting the executive or the courts. After all, the President had just vetoed the Civil Rights Bill[153] and the Supreme Court was still recovering from the ignominy of the *Dred Scott*[154] decision.

Legal scholars during that era would probably not have been particularly concerned with the meaning of the term "enforce." Although the allocation of enforcement power to Congress was unique, the concept of enforcement was perceived as quite clear. Essential to the separation of powers was the belief that precise distinctions could be made between the executive, legislative and judicial powers.[155] This belief was undoubtedly shared by those in Congress who proposed the fourteenth amendment, and, indeed, that belief is implicit in Justice Harlan's dissent in *Morgan*.[156]

The idea that there is an absolute distinction between legislation, enforcement and interpretation contradicts fundamental principles of twentieth-century jurisprudence.[157] Modern jurisprudence recognizes that the act of enforcement necessarily entails interpretation, and that interpretation may sometimes be legislative in nature.[158] This basic change in legal thinking is central to the disagreement between Justice Brennan and Justice Harlan.

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[150] *See* L. TRIBE, *supra* note 15, §§ 2-1, -4.

[151] *See id.* §§ 3-1 to 5-22.

[152] 100 U.S. 339, 345 (1879).

[153] *See* H. FLACK, *supra* note 43, at 35-37.

[154] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[155] *See* L. TRIBE, *supra* note 15, § 1-2, at 3-7. "Thus it was largely through the preservation of boundaries between and among institutions . . . that the rights of persons were to be secured." *Id.* at 3.

[156] 384 U.S. at 666 (Harlan, J., dissenting).

[157] "Enacted law may displace decisional law as a means of initial formulation of legal arrangements, but not as a means of elaboration. For enactments need to be interpreted and interpretation can scarcely be avoided at the stage of authoritative application." H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 140 (tent draft 1958). *Accord,* H.L.A. HART, THE CONCEPT OF LAW 148-49 (1961); Pound, *Justice According to Law,* in ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 239-40 (1963).

[158] *See* note 157 *supra.*

Congress cannot possibly "enforce" section 1 of the fourteenth amendment without first interpreting the provisions to be enforced. Congressional primacy in enforcement, granted by section 5, is necessarily primacy in interpretation. Justice Brennan's assertion that Congress may "enforce" but not "restrict, abrogate, or dilute" becomes, simply, an observation that there are clear cases and hard cases, concepts which are also central to elementary modern jurisprudence.[159] Thus when Justice Brennan asserts that Congress could not use its section 5 power to mandate segregated school systems because the equal protection clause "of its own force prohibits such state laws,"[160] he may be asserting nothing more than the proposition that, like most laws, the equal protection clause is easily construed when applied to some questions and much more difficult to construe in others.

Delineation of that "core" of the fourteenth amendment which Congress cannot alter will, of course, ultimately be left to the Court. However, some of the perimeters of the core/penumbra distinction can be deduced, and an analogy to the commerce clause[161] is a helpful guide. The commerce clause is a grant of power to Congress with no explicit exclusion of state regulation. Nevertheless, the Supreme Court has always been willing to imply the negative corollary and to strike down state statutes with substantial interstate impact, even in the absence of congressional regulation.[162] Although merely a grant of power to Congress, the clause, even absent an exercise of the power, prohibits various state actions "of its own force."[163] The similarity to the fourteenth amendment is apparent, especially since Congress' power, once exercised, can prohibit a greater range of state action than the Supreme Court could bar in the absence of congressional action. Congress can, as Justice Brennan perceived, expand the scope of the fourteenth amendment's limitations on state action in the same way it can extend the range of prohibited state action under the commerce clause.

Justice Brennan's "ratchet" assertion, that Congress can expand the amendment's guarantees but not "restrict, abrogate, or dilute" it,[164] re-

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[159] *See, e.g.*, Friedman, *Legal Philosophy and Judicial Lawmaking*, in ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 103 (1963). As Professor Friedman notes, the distinction between core and penumbra is not a mechanically precise one but, "[t]he elucidation of legal concepts by the study of 'meaning' and reference to the distinction between an inner core and an outer penumbra can sharpen our analytical thinking; it can eliminate, or at least reduce inconsistencies and spotlight the areas of legal uncertainty." *Id.* Of course, this article argues that in the present context these concepts are useful in the allocation of authority as well.

[160] Morgan, 384 U.S. at 651 n.10.

[161] U.S. CONST. art. I, § 8, cl. 3.

[162] *See* L. TRIBE, *supra* note 15, § 6-2.

[163] *Id.* § 6-2, at 320.

[164] 384 U.S. at 651 n.10.

mains to be considered. Here the analogy to the commerce clause is one of contrast, rather than congruence for, while the commerce clause consists only of a grant to Congress, the fourteenth amendment contains both a direct limitation on the states and a grant to Congress. This direct limitation on the states has a direct force that cannot be found in the commerce clause and which serves as a limit on Congress' power. While Congress can exercise its regulatory power under the commerce clause to legitimate state action that would otherwise run afoul of the article I, section 8 implied limitation on state power, its power to "enforce" the fourteenth amendment must further the amendment's central mandate and not abolish it.

The first Justice Harlan, in *Plessy v. Ferguson*,[165] and Justice Douglas, in *DeFunis v. Odegaard*,[166] asserted that the fourteenth amendment rendered the Constitution color-blind. The limitation of section 1 of the equal protection clause on the states can be interpreted as making color-blindness the penultimate directive. Congress cannot, in "enforcing" that mandate, simply direct the states to take color into account in favor of minorities, but not against them. Congress can, however, require that specific problems created by the historic deprivation of equality be redressed by specific, race-conscious programs of reasonable dimensions related to the effects of past violations. In other words, Congress' power to enforce section 1 is no more limited than that approved for judicial use in *Swann v. Charlotte-Mecklenburg Board of Education*.[167] Accordingly, Congress may require that state institutions of higher education prepare affirmative action programs for submission to, and approval by, the Department of Education, whether or not the Court would require such plans of particular institutions. Furthermore, Congress may restrict the benefit of such plans to blacks, regardless of whether the Court, as in *Bakke*, would approve plans in which the term "minorities" is more broadly defined.[168]

This is not to suggest that any congressional action adversely affecting women, the poor, or other suspect or "semi-suspect" classes[169] would necessarily be valid. Such actions would be subject to the fifth amendment due process inquiry applicable to any congressional action.[170] While

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[165] 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[166] *See* 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting).

[167] 402 U.S. 1 (1971); *Accord*, Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[168] The courts would, of course, be free to remedy any particular instance of traditional discrimination on the basis of race, even if Congress had excluded that minority from a national statutory remedial plan. *Fullilove* also suggests that the courts retain the power to remedy any irrational or invidious under-inclusion by Congress. *See* 100 S. Ct. 2758, 2781 (1980).

[169] L. TRIBE, *supra* note 15, § 16-29 (using the term "semi-suspect").

[170] *See generally id.* §§ 17-1, -3 (proposing a model of "structural justice" which is, in many ways, a prototype for the due process analysis argued for in the present case).

such an inquiry would not incorporate the compelling state interest standard and related accoutrements of full-scale fourteenth amendment inquiries,[171] it need not necessarily sink to the toothless minimum rationality standard[172] that is also a part of fourteenth amendment analysis. In fact, such an inquiry might well represent the intermediate standard of review which the Court has from time to time sought to articulate.[173]

So if, as in *Bakke*, a state or state subsidiary bases its actions on racial classifications, those actions may be challenged as violative of the fourteenth amendment. In the absence of congressional authorization of a "race-conscious remedy," it is the Court's duty to enforce the section 1 prohibition against state created racial classifications. When, as in *Weber*, the discrimination is by private parties, the question is simply whether Congress has prohibited such actions absent state involvement. While one may disagree with the Court's answer to that question, this analysis indicates that the reliance on statutory construction for the answer was correct. Finally, when as in *Fullilove*, Congress has enacted a program of benign discrimination, such an action is permitted unless so excessive or arbitrary as to constitute a violation of due process.

The analysis proposed here concedes to Congress the power to define equal protection more narrowly than the Court and, hypothetically, to overrule the Court by cutting back on the import of the Court's decisions. Congress' ability to narrow the scope of section 1 is, however, hedged by a variety of limitations. First, as argued above, there is substantial protection from arbitrary congressional action in the fifth amendment.[174] Second, Congress' actions must be legitimate attempts at enforcement; thus, judicial review could properly inquire into Congress' motive or intent if, for example, it were to attempt to prohibit busing for school desegregation as an exercise of its section 5 power.[175] Two cases can be distinguished here. The first is a congressional attempt to enforce the fourteenth amendment by statutorily empowering a federal agency to take various measures to accomplish school desegregation while prohibiting the agency from requiring busing as a part of any school desegregation plan. Such a congressional decision would undoubtedly be valid and enforceable. Second, Congress may attempt to bar the use of busing as a judicial remedy even when a court has found a

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[171] *See id.* §§ 16-1, -57.

[172] *See* Gunther, *supra* note 24, at 18-19.

[173] *See id.*

[174] *See* notes 31-48 & accompanying text *supra.*

[175] Intent, of course, is becoming a standard ingredient of the Court's analysis. While in some recent materializations its use was inappropriate, intent is a concept the current Court is certainly willing to tackle. *See, e.g.*, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

state violation of section 1 of the fourteenth amendment. This latter case would be impermissible, even under the broad view of section 5 taken here.[176]

Although the power of Congress to enforce the mandate of section 1 against states is plenary, and reasonable congressional commands should be enforced, this enforcement power is not grounds for an independent, direct limitation of the power of the courts.[177] At the time the fourteenth amendment was passed, *M'Culloch v. Maryland*[178] and *Martin v. Hunter's Lessee*[179] had established the Court's power to review state laws. Section 1 of the fourteenth amendment provides an independent and sufficient basis for Supreme Court review of state law, and for the plenary equitable power of the federal court to fashion remedies.[180] Section 5 is a grant of legislative power to Congress to enforce section 1 against the states. That power may be exercised if the Court fails in its duty to enforce the amendment (which may be what the framers feared) or in the absence of state action or judicial dereliction. Unlike article III, it does not give Congress power to curtail the general powers of the Court.[181]

Finally, the political process is a significant safeguard against congressional action narrowing the scope of equal protection.[182] Historically, Congress has been more active in promoting equal protection than the

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[176] *See* Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1710-1758 (1976). The constitutionality of that Act has never been tested. The anti-busing statute is discussed in Gordon, *The Nature and Uses of Congressional Power Under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U. L. REV. 656 (1977). Professor Gordon's analysis differs from the analysis presented here in stating the primary limits of Congress' § 5 power to be its "fact finding" purpose, *id.* at 680, and the concerns of federalism, *id.* at 684. Accordingly, Professor Gordon concludes that Congress could dictate to the courts concerning the priority of remedies, but Congress could not preclude the remedy of busing altogether. This author disagrees with the thesis that Congress' enforcement power is limited to the use of its fact-finding mechanisms, and even more strongly with the notion that federalism is a meaningful independent limitation on § 5. Accordingly, the author agrees with Professor Gordon's conclusion on busing, but not with his reasoning. Professor Gordon also explores the potential use of Congress' power in the area of abortions, but this question is beyond the scope of this article. The issue is whether Roe v. Wade, 410 U.S. 113 (1973), rests on the fourteenth amendment or on other grounds. If it rests on the fourteenth amendment alone, Congress may have the power to extend due process protection to a fetus by a congressional definition of "person" to which the Court would necessarily defer, though this author believes that would be an exercise of poor judgment by Congress. *See also* Harris v. McRae, 100 S.Ct. 2671 (1980).

[177] *Contra*, R. BORK, CONSTITUTIONALITY OF THE PRESIDENT'S BUSING PROPOSALS 5-17 (1972).

[178] 17 U.S. (4 Wheat.) 316 (1819).

[179] 14 U.S. (1 Wheat.) 304 (1816).

[180] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[181] *See* R. BERGER, CONGRESS V. THE SUPREME COURT (1969). Mr. Berger takes a quite narrow view of Congress' article III power to limit the Court's jurisdiction. *Id.* at 289-90. Berger also quite properly notes that the fifth amendment limits Congress' power to arbitrarily curtail Supreme Court jurisdiction. *Id.* at 283, 337.

[182] *See* text accompanying notes 194-218 *infra*.

Court.[183] From the Civil Rights Act of 1875[184] to the Civil Rights Act of 1964,[185] Congress has led the way in promoting equality. Although conservative congressmen who call for the curtailment of the Court's decisions receive a great deal of publicity, such calls have been invariably unsuccessful.

If the core meaning of equal protection which Congress cannot alter is narrowly defined, the outer penumbra of the concept is correspondingly broad. Historically, opponents of a broad construction of the section 5 power have raised the specter of congressional abolition of the states as meaningful polities.[186] Despite such fears, even under the analysis proposed here some areas would remain beyond the scope of federal regulation. It is doubtful, for example, that state or local building codes could be overridden by Congress on the basis of section 5. The further Congress strays from intervention into state laws that classify persons on the basis of innate characteristics, the less likely it becomes that such action will be sustained as a section 5 "enforcement" of equal protection. However, the real check on Congress is its own political composition, which makes it very unlikely to ever attempt a wholesale usurpation of state control, even assuming its action could be supported by a broad reading of section 5.[187]

Justice Harlan, expressing concern for his conception of the proper role of judicial review, was correct in declaring that "there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment."[188] He may have been equally correct in adding that, until *Morgan*, "this judgment has always been one for the judiciary to resolve."[189] However, Justice Harlan was in error in assuming that such judgment was necessarily the sole province of the Court. This assumption denies the revolutionary nature of the enforcement clauses of the Reconstruction amendments, and avoids the basic truth articulated in *Ex Parte Virginia*.[190] It was the power of Congress that was enlarged by the amendments—not that of the judiciary. Of course, this enlargement en-

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[183] Perhaps the outstanding exception, of course, is Brown v. Board of Educ., 347 U.S. 483 (1954). However, even in this instance the impact on segregation of schools by *Brown* has been minimal compared with the impact on hotels, restaurants and employment by the Civil Rights Act of 1964, 42 U.S.C. § 2000 (1976).

[184] Ch. 114, 18 Stat. 335 (1875) (repealed 1948).

[185] 42 U.S.C. §§ 2000a-2000h (1976).

[186] *See* notes 108-10 & accompanying text *supra*.

[187] *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-60 (1954).

[188] Katzenbach v. Morgan, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

[189] *Id.* (Harlan, J., dissenting).

[190] 100 U.S. 339 (1879).

tails a change in the pre-existing constitutional scheme; it is, after all, the nature of amendments to change the Constitution.

This argument does not concede the second concern of Justice Harlan, that, in the words of one commentator, *Morgan* "stood *Marbury v. Madison* on its head."[191] The issue in *Marbury* was whether there would be judicial review; it has never dictated the scope or standard of that review. Judicial review and the primacy of congressional enforcement powers under section 5 are different aspects of the same question. Congress' primacy is not a blank check. As Justice Brennan said, Congress cannot, in the guise of enforcement, enact statutes that contravene the plain meaning of section 1.[192] It remains the Court's duty to determine if, and when, Congress has gone beyond the permissible bounds. Thus the analysis presented here, and suggested by *Morgan*, does not eliminate judicial review; it merely places Congress' section 5 power on a level with the other express grants of congressional power. This is no more than the fourteenth amendment itself requires.[193]

### *Section 5 and Federalism*

The constraints of traditional federalism have been urged by opponents of an expansive interpretation of the section 5 power ever since the original debates over the amendment's enactment.[194] Justice Black's objections to congressional determination of state voting standards in *Mitchell* were much the same as the fears of Justice Miller in the *Slaughter-House Cases*.[195] Their common concern was the preservation of the traditional boundary between state and federal functions.[196]

The federalism argument is that if Congress can reach private conduct under section 5 and enact primary, affirmative legislation, then it can, while ostensibly enforcing due process or equal protection, replace state criminal and social legislation of every kind.[197] The simplest answer to this is the classic retort Justice Holmes made to Justice Marshall's famous dicta that "the power to tax involves the power to destroy."[198] Justice Holmes simply replied: "[N]ot . . . while this Court

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[191] Cohen, *supra* note 91, at 606.
[192] Morgan, 384 U.S. at 651 n.10.
[193] *See* Fullilove, 100 S. Ct. at 2772.
[194] *See* notes 55-68 & accompanying text *supra*.
[195] *See* notes 108-10 & accompanying text *supra*.
[196] Indeed, one discussion of the *Guest* and *Morgan* cases was entitled, somewhat facetiously, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*. *See* Comment, *supra* note 91.
[197] *See id.* at 311.
[198] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

sits."[199] *M'Culloch* presented a more sophisticated resolution to the problem: Congress cannot, under the pretext of exercising its powers, pass laws to accomplish objects not entrusted to it.[200] Thus, the answer to the federalism issue is the same as the answer given to the issue of judicial review; Congress' power is limited to the language and purposes of the fourteenth amendment, and that limitation is enforceable by the Court.

Beyond this, the issue of federalism is more illusory than real. Federalism is inherently an indirect, rather than direct, limitation. It is the residuum left when express constitutional provisions have been defined. It is expressed in the tenth amendment in this indirect, residual manner.[201] From this perspective, federalism has no place in the section 5 inquiry. The only real question is the extent to which Congress chooses to exercise its powers, subject only to the constraint of judicial review of possible excesses.[202] In this sense, Congress itself disposes of the federalism issue.

One can argue that the fourteenth amendment puts federalism more directly in issue, for the amendment was initially conceived as an attack on the federalist "states' rights" position which had produced the *Dred Scott* decision[203] and, ultimately, civil war. The essence of the fourteenth amendment was a redistribution of power within the federal system, expanding the power of the federal government while diminishing the power of the states[204] and transferring the responsibility for the protection of civil rights from the states to Congress.[205] This perspective suggests that arguments for a traditional distribution of functions must yield to the recognition (to paraphrase a cliché) that it is an *amendment*

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[199] Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928); *see* Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 118 (1966).

[200] 17 U.S. (4 Wheat.) at 422.

[201] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[202] *See, e.g.*, L. TRIBE, *supra* note 15, § 5-20, at 302-03; Comment, *supra* note 91, at 314-15. *But cf.* Bickel, *supra* note 91, at 96-97 ("Nothing is clearer about the history of the Fourteenth Amendment than that its framers rejected the opinion of an open-ended grant of power to Congress to meddle with conditions within the states so as to render them equal in accordance with its own notions."). With all due respect to Professor Bickel, who cites no authority whatsoever for his proposition, nothing is clearer about the history of the fourteenth amendment than that it is unclear. Certainly if its "framer" was Representative Bingham then Professor Bickel's statement is meaningless, if not untrue. Representative Bingham was nothing if not anti-states rightist. How open-ended he intended his grant to be is not, in the end, nearly as important as the question of how open-ended it must be to accomplish its purpose. *See* H. FLACK, *supra* note 43, *passim*.

[203] Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[204] *See* note 241 & accompanying text *infra*.

[205] *See* The Civil Rights Cases, 109 U.S. 3 (1883).

that we are expounding. The issue is not the constraints of traditional federalism but, rather, the extent to which we choose to recognize the fourteenth amendment as changing those constraints. Whether the problem is the limits on congressional action or the inquiry is phrased in terms of the impact of the fourteenth amendment on federalism, the inevitable corollary question is a determination of who is to decide.

Professor Bickel, in a review of the voting rights cases, rejected the broad view of Congress' power announced in those cases and advanced here.[206] He contended that such a broad view is historically incorrect and violates the fundamental principle that "Congress does not define the limits of its own powers," the Court does.[207] This overlooks the fact that, while the outer limits may, indeed, be the Court's responsibility, Congress decides, within that limit, how far it will go in *exercising* its power.[208] Of course, Congress cannot extend its commerce power indefinitely, but that is not a pressing constraint.[209] Just as federalism has, for some time, been recognized as a function of congressional discretion rather than of judicial circumscription, so must section 5.[210]

Federalism may, also, be considered as a problem of guardianship. Professor Wechsler has argued that federal intervention in states' matters and federalism generally, are matters for congressional determination.[211] That general view is particularly applicable to section 5. Professor Freund, in a 1958 article discussing the furor surrounding the Warren Court,[212] discusses a parable of Ludwig Wittgenstein: a wife asked her husband to teach their young son a game. When the husband taught the boy to play with dice, the wife protested that she did not *mean* that kind of "game." Freund asks what the wife meant by "mean." Had she considered dice, or did she mean that if she had considered dice she would have excluded them? Freund says that for terms such as "due process" and "equal protection," neither of these alternatives is the appropriate inquiry; rather, it is as if the wife had bequeathed a fund to trustees, to be used to teach games to boys. If, Freund suggests, the question of whether a given game is appropriate arises some seventy-five years later, the answer should not be drawn from an inquiry into whether the mother had considered that game, or what she would have thought had she considered the game, but, rather, the answer must be based on the presumption that she intended the trustees to decide in

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[206] Bickel, *supra* note 91.
[207] *Id.* at 96-97.
[208] L. TRIBE, *supra* note 15, § 5-20, at 302-03; Cox, *supra* note 199, at 119.
[209] L. TRIBE, *supra* note 15, § 5-20, at 302-03.
[210] *Id.* at 302-04.
[211] Wechsler, *supra* note 187.
[212] Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 349-50 (1958).

light of the conditions and mores then prevailing. Freund concludes that this is the problem of equal protection: the question should be left to the trustees, not to the "meaning" of the framers.[213]

To take Professor Freund's parable one step further, in the present case the question is not only whether the trustees must decide, but who the "trustees" of the fourteenth amendment are. The answer section 5 provides is clear: Congress is the trustee bequeathed the enforcement power. Congress may exceed its discretion as trustee, in which case the Court may intervene, but the initial decision is Congress' to make. Thus Professor Bickel, like Justice Harlan, errs in equating "interpretation" and "federalism" with the judicial power residing in the Court. The balance of federalism in the fourteenth amendment area is determined by the extent to which Congress chooses to exercise its power, subject to the same broad limitations as other express congressional powers.

That Congress may decide issues of federalism and benign discrimination for itself is but half of the actual federalism question. The other half is whether Congress should exercise its power to advance a national, rather than state-by-state, solution. Professor Cox, in a penetrating analysis of the Supreme Court's 1965 term, discussed the federalism implications of *Morgan* and *Guest*, acknowledging that the principal issue was "how widely should Congress choose to extend federal regulation."[214] In responding to that question, he pointed to the national nature of racial problems and the national "pressure for affirmative government action."[215]

Certainly both factors weigh very strongly in favor of a national resolution. While the University of California or the University of Washington may play an important role in providing educational opportunities to racial minorities, the problem, and the burden of solution, is neither uniquely California's nor Washington's. Indeed, as Justice Douglas noted in *DeFunis*, the pre-minority admissions program percentage of blacks at the University of Washington Law School mirrored the state's black population percentage.[216] Thus, a meaningful minority admissions program at the University of Washington was more a contribution to resolving a national problem than an internal, Washington problem. Putting the University of Washington's program in a context of federally authorized affirmative action is hardly placing undue emphasis on the national character of the problem, or the need for a national solution.

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[213] *Id.* at 350.

[214] Cox, *supra* note 199, at 119; *see* Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 245-47 (1971).

[215] Cox, *supra* note 199, at 119.

[216] 416 U.S. 312, 327 (1974) (Douglas, J., dissenting).

In addition to the appropriateness of a national, congressional resolution, the benefits which could accrue from a congressional rather than a judicial solution must be considered. Many commentators, in addition to Professor Cox, have emphasized the desirability of legislative solutions to fourteenth amendment problems.[217] As Professor Cox noted with respect to school desegregation, the extent of necessary affirmative action is a "matter of degree to be judged by weighing the importance of the goal against competing considerations."[218]

## THE BENIGN DISCRIMINATION CASES

### *Round One:* United Jewish Organizations v. Carey

After its *Mitchell* "disaster," the Court avoided further development of *Morgan* or section 5 until *Fullilove v. Klutznick.*[219] This abstention is especially puzzling in light of the opportunity presented in *United Jewish Organizations v. Carey* (*UJO*).[220] The plaintiffs challenged a New York state legislative redistricting plan which intentionally split the white, Hasidic Jewish community of the Williamsburgh area of Brooklyn in order to increase the voting percentages of nonwhites in the resulting districts.[221] The defendants responded that the plan was devised to comply with the directions of the United States Attorney General, acting pursuant to the Voting Rights Act of 1965.[222]

Once again, as in *Mitchell*, the Court was unable to unite behind a single opinion. Although seven of the eight justices participating in the decision agreed that the petitioner's claim should be denied, they split over the proper grounds for that result. Justice White, joined by Justice Stevens, would have ruled the New York plan lawful,[223] as within the reach of the Court's prior Voting Rights Act decisions in *Beer v. United States*[224] and *City of Richmond v. United States.*[225] Justices White and Stevens, as well as Justice Rehnquist, would also have sustained the New York plan in the absence of the Voting Rights Act, on the grounds that the fourteenth amendment permitted the purposeful use of race in redistricting, provided that the plan represented no racial slur or

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[217] *See, e.g.*, Cohen, *supra* note 91; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975).

[218] Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 260 (1971).

[219] 100 S. Ct. 2758 (1980).

[220] 430 U.S. 144 (1977).

[221] *Id.* at 151-53.

[222] *Id.* at 148-51.

[223] *Id.* at 168.

[224] 425 U.S. 130 (1976), *cited at* 430 U.S. at 159-60.

[225] 422 U.S. 358 (1975), *cited at* 430 U.S. at 160-61.

stigma and did not minimize, unfairly cancel or fence out white voting participation or white voting strength.[226] Justices Brennan and Blackmun concurred in that portion of Justice White's opinion which rested on the Voting Rights Act.[227] Justices Stewart and Powell would have denied petitioners relief for their failure to show a discriminatory purpose.[228] Chief Justice Burger dissented on the grounds that the Court's decision in *Gomillion v. Lightfoot*[229] precluded race conscious redistricting in the absence of the Voting Rights Act[230] and that the record did not support the conclusion that the New York plan chosen was supported by the Voting Rights Act.[231] Chief Justice Burger concluded by attacking the "mechanical racial gerry-mandering" of the New York plan as inconsistent with the mandate of the Constitution.[232]

Of the four separate opinions filed in *UJO*, only the concurring opinion of Justice Brennan rested on the Voting Rights Act alone.[233] Moreover, this opinion was the only one to take even partial cognizance of the implications of *Morgan* for the resolution of the issue raised by *UJO*.[234] Justices White, Stevens, Rehnquist, Stewart and Powell showed a remarkable lack of restraint in deciding hypothetical constitutional issues in the face of adequate statutory grounds. Even more regrettable, however, was the failure of any member of the Court to revitalize the section 5 analysis of *Morgan* in the face of the growing constitutional storm over benign discrimination. Justice Brennan did devote a paragraph of his opinion to a peripheral discussion of the importance for *UJO* of a congressionally mandated remedial scheme. He noted that the Voting Rights Act was "the product of substantial and careful deliberations," designed "to secure the promise of the Fourteenth and Fifteenth Amendments" and, therefore, he found support for "the legitimacy of... race-conscious remedial techniques."[235]

In failing to limit their opinions to the statutory issue, Justices White and Stewart revealed the fracture in the Court's approach to benign discrimination which led to the *Bakke* breakdown. Justice White's willingness to authorize broad benign discrimination contrasted with the more conservative limitation on state action of a discriminatory purpose

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[226] 430 U.S. at 165.
[227] *Id.* at 168-69 (Brennan, J., concurring in part).
[228] *Id.* at 179-80 (Stewart, J., concurring) (joined by Powell, J.).
[229] 364 U.S. 339 (1960).
[230] 430 U.S. at 181 (Burger, C.J., dissenting).
[231] *Id.* at 184 (Burger, C.J., dissenting).
[232] *Id.* at 187 (Burger, C.J., dissenting).
[233] *Id.* at 171 (Brennan, J., concurring in part) ("I am convinced that the existence of a Voting Rights Act makes such a decision unnecessary and alone suffices to support an affirmance of the judgment before us.").
[234] *Id.* (Brennan, J., concurring in part).
[235] *Id.* at 176-77 (Brennan, J., concurring in part).

or effect posited by Justice Stewart.[236] The section 5 issue, broached so tentatively by Justice Brennan, was simply whether or not congressional authorization of race-conscious solutions to past discrimination is valid. The answer, quite clearly, is yes. The Court has consistently supported its own power to impose race-conscious remedies for discrimination;[237] under *Morgan*, Congress' section 5 power should be at least equal to that of the Court.[238] Thus, the insistence of four Justices upon independently determining the constitutionality of the New York plan was not only unnecessary, it violated the major premise of *Morgan*—that where Congress has exercised its section 5 power, the Court's independent construction of the fourteenth amendment is secondary and the Court's function is limited to the broad standard of judicial review established in *M'Culloch*.[239]

Although *Morgan* spoke only to the issue of Congress' power, there is a more profound issue which underlies it. Simply granting Congress the power to abolish the requirement of English literacy, a power also clearly within the reach of the states, does not necessarily indicate that Congress' power in the area of equal protection is much greater than that of the states.[240] While section 1 operates as a prohibition against various state actions, it contains no affirmative grant of power to the states to enforce the right to due process and equal protection. The power of the state courts and legislatures is limited to the narrow duty to carry out section 1's prohibition of race-conscious state action and its requirement of due process. The state legislator's constitutional duty is to refrain from enacting laws requiring or permitting race-conscious state action. The state court's constitutional duty is to nullify any such state law. Race-conscious affirmative remedies—reverse or benign discrimination—are beyond the power of the state legislatures and courts, absent an express federal congressional or judicial directive. *Ex Parte Virginia* recognized that, as the power of Congress was enlarged, the power of the states was diminished.[241]

*Morgan* went only halfway; in it, the Court recognized the power of Congress, but did not distinguish the power of the states. In *UJO*, Justices White and Stewart failed to recognize the broader implication of section 5 and the Voting Rights Act, that Congress could enact

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[236] *See id.* at 179 (Stewart, J., concurring) (joined by Powell, J.).

[237] *Id.* at 171 (Brennan, J., concurring in part).

[238] *See* 384 U.S. at 648-49; *accord*, Fullilove, 100 S. Ct. at 2776.

[239] 384 U.S. at 650-51 (citing M'Culloch v. Maryland, 17 U.S. at 420).

[240] Professor Cohen would simply stop with the inquiry as to whether Congress' act would be permissible on the state level. *See* Cohen, *supra* note 91, at 613-19.

[241] 100 U.S. 339, 345 (1879) ("[The thirteenth and fourteenth amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.").

remedies for racial discrimination which the states, acting alone, could not. Thus, the problem of benign discrimination cannot be resolved without reference to the authority for the discrimination. Section 5 gives Congress the power to remedy violations of equal protection, while section 1 prohibits the states from acting in other than a color-blind manner. Justice Brennan, in *UJO*, recognized Congress' power to authorize race-conscious remedies for equal protection problems and to delegate the structuring of compliance with these remedies to state officials.[242] Quite properly, he declined to decide whether or not those state officials could have acted similarly absent congressional authority.[243] Unfortunately, when called upon to decide that question in *Bakke*,[244] Justice Brennan answered it affirmatively without providing a convincing rationale for doing so.

### *Rounds Two, Three and Four:* Bakke, Weber *and* Fullilove

In *DeFunis v. Odegaard*,[245] the Supreme Court, over the vigorous dissent of Justice Douglas,[246] avoided the difficult issue of the constitutionality of benign or reverse discrimination on the grounds that the case before it was moot.[247] It was inevitable that the postponement of the decision would be brief.[248] When the Justices agreed to hear *Regents of the University of California v. Bakke*,[249] the issue was squarely before the Court. However, the *Bakke* decision hardly answered more questions than did *DeFunis*. With eight members of the Court divided into opposing groups of four, wholly unable to agree on the applicable principles of law, Justice Powell announced the judgment of the Court, siding with each group on some issues. Four Justices would have upheld the voluntary use of race-conscious medical school admissions programs, even when those programs set aside a fixed number of admissions for racial minority group members.[250] Those Justices would have ruled that such programs violated neither the fourteenth amendment nor Title VI of the Civil Rights Act of 1964, which they felt incorporated the con-

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[242] 430 U.S. at 176 (Brennan, J., concurring in part).

[243] *Id.* at 171 (Brennan, J., concurring in part) ("Unlike Part IV of Mr. Justice White's opinion, I am wholly content to leave this question until another day.").

[244] 438 U.S. 265, 366 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring & dissenting in part).

[245] 416 U.S. 312 (1974).

[246] *Id.* at 320 (Douglas, J., dissenting).

[247] *Id.* at 319-20.

[248] *Id.* at 350 (Brennan, J., dissenting).

[249] 438 U.S. 265 (1978).

[250] *Id.* at 378 (Brennan, White, Marshall & Blackmun, JJ., concurring & dissenting in part).

stitutional standard.[251] Four Justices held simply that Title VI prohibited such race-conscious programs, and that it was, therefore, unnecessary to reach the fourteenth amendment issue.[252] Justice Powell cast the decisive vote, agreeing that Title VI and the equal protection clause contained the same standard.[253] He supported the general principle that race-conscious affirmative action programs do not violate the fourteenth amendment or Title VI.[254] However, Justice Powell held that in the absence of appropriate judicial, legislative or administrative findings of prior discrimination the University of California's use of a fixed number of separate minority admissions was impermissible.[255]

Among the fundamental issues which split the Court in *Bakke* was whether Congress had intended Title VI of the Civil Rights Act of 1964 to apply only to those discriminations prohibited by the fourteenth amendment, or whether Title VI was intended to ban all discrimination in federal programs whether or not such discrimination would have violated the equal protection clause. Five Justices held that Congress had intended Title VI to embody the constitutional standard while four Justices concluded, without construing the requirements of the fourteenth amendment, that Congress had intended to adopt an independent "color-blind" standard for Title VI. None of the Justices raised the reciprocal issue: did Congress intend to permit discriminations which would have been prohibited by the independent application of the fourteenth amendment? That, of course, is the ratchet problem of *Morgan* re-emerging in *Bakke* and *Weber*.

In light of the obvious failure of the two-tier equal protection analysis to produce a coherent result in *Bakke*, it is not surprising that the Court avoided the constitutional issue entirely in *United Steelworkers v. Weber*.[256] Justice Brennan, writing for the five-Justice majority, held, first, that a private employer's apprenticeship training program, requiring that fifty percent of the trainees be black, involved no state action and, therefore, no fourteenth amendment question.[257] Second, Justice Brennan declared that because the plan in question was voluntary, the issue was not what Title VII requires or empowers a court to require, but rather, was whether Title VII forbids such voluntary "bona fide affirmative action plans that accord racial preferences."[258] While Justice

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[251] *Id.* at 324-28 (Brennan, White, Marshall & Blackmun, JJ., concurring & dissenting in part).

[252] *Id.* at 411-12, 418 (Stevens, J., concurring & dissenting in part) (joined by Burger, Stewart & Rehnquist, JJ.).

[253] *Id.* at 287.

[254] *Id.* at 320.

[255] *Id.* at 301-04, 320.

[256] 443 U.S. 193 (1979).

[257] *Id.* at 199-200.

[258] *Id.*

Brennan conceded that the statute on its face prohibited the consideration of race in employment, he reasoned that the statutory history required the conclusion that "an interpretation . . . that forebade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."[259] Having thus construed Title VII to permit the voluntary use of benign discrimination, Justice Brennan had little difficulty in determining that the challenged plan was permitted. He declined to define the line between permissible and impermissible affirmative action plans, holding that the Kaiser-Steelworkers program was a permissible one.[260] The only criteria he noted in support of the program were its purposes, the fact that it did "not unnecessarily trammel the interests of the white employees" and that it was to be a temporary measure.[261]

*Weber* answered one part of the question *Bakke* left open, that is, whether Congress, in enacting the Civil Rights Act of 1964, prohibited benign discrimination. While responding to that question in the negative, the Court gave a clear, if only implicit, answer to the converse question of whether Congress could prohibit voluntary, private affirmative action and mandate adherence to a color-blind standard. Only one question remained after *Weber*: If Congress could allow benign discrimination, as the Court ruled they had permissibly provided in Title VII, or could prohibit it, as the Justices agreed they could have done, could they require it? That question was addressed in *Fullilove v. Klutznick*,[262] and the response of six Justices was a clear "yes." Within that majority, however, there were significant differences in approach.

*Fullilove* challenged the validity of the "minority business enterprise," or "set-aside," provision of the Public Works Employment Act of 1977.[263] That section required that ten percent of the federal funds granted for local public works projects be allocated to businesses owned and controlled by specified racial and ethnic minorities.[264] Chief Justice Burger, joined by Justices White and Powell, separately analyzed the validity of the set-aside for private contractors and for state and local governments.[265] He upheld the set-aside as applied to private contracting parties, concluding that its objective was within the scope of Congress' spending and commerce powers.[266] He then found that the means chosen were necessary and proper for accomplishing that valid

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[259] *Id.* at 201-02 (citations omitted).
[260] *Id.* at 208.
[261] *Id.*
[262] 100 S. Ct. 2758 (1980).
[263] 42 U.S.C. § 6705(f)(2) (Supp. III 1979).
[264] *Id.*
[265] 100 S. Ct. at 2772-80 (Burger, C.J.).
[266] *Id.* at 2772-73 (Burger, C.J.).

objective.[267] Turning to the validity of the set-aside as a federal regulation of state and local governments, the Chief Justice shifted from the commerce power, with its federalism constraints, to section 5 of the fourteenth amendment. Citing *Morgan* for the proposition that the limit of Congress' section 5 power is defined by the broadly worded necessary and proper clause,[268] he concluded, again, that the objective of remedying prior discrimination was within the scope of section 5.[269] He then turned to the question of whether the use of racial and ethnic criteria in the set-aside was a valid means to that constitutionally valid objective. Here was his most delicate task; if he applied traditional equal protection analysis, citing *Bolling v. Sharpe*[270] and *Washington v. Davis*,[271] he would have been unable to rebut the dissent of Justices Stewart and Rehnquist who correctly concluded that the two-tier test required invalidating the set-aside.[272] In that direction lay the chaos of *Bakke*. Instead, the Chief Justice skirted the issue of the appropriate test, emphasizing only "the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria . . . [to remedy] . . . the present effects of past discrimination is narrowly tailored to the achievement of that goal."[273] He then upheld the set-aside, citing its remedial nature, prospective function, good faith waiver provisions and administrative safeguards.

If the Chief Justice had stopped at that point, the revolutionary ramifications of his opinion would, perhaps, have been less clear. Instead, he chose to elaborate on his reconciliation of this exercise of section 5 power with the constraints of equal protection, rejecting the proposition that Congress' section 5 power must be exercised in a color-blind fashion.[274] In support of this conclusion, he cited the *Swann* doctrine which allows the courts to fashion race-conscious remedies,[275] and declared that Congress' remedial power was at least as broad as the

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[267] *Id.* at 2775-80 (Burger, C.J.). Chief Justice Burger's choice of the "necessary and proper" test rather than any of the "equal protection" tests is, of course, completely consistent with the thesis of this article.

[268] *Id.* at 2774 (Burger, C.J.) (citing 384 U.S. 641 (1966) as it construed U.S. CONST. art. I, § 8, cl. 18).

[269] 100 S. Ct. at 2775 (Burger, C.J.).

[270] 347 U.S. 497 (1954).

[271] 426 U.S. 229 (1976).

[272] 100 S. Ct. at 2800 (Stewart, J., dissenting) (joined by Rehnquist, J.). However, the Chief Justice appended the following unsupportable dictum: "This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]. However, our analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions." 100 S. Ct. at 2781 (Burger, C.J.) (citation omitted).

[273] *Id.* at 2776 (Burger, C.J.).

[274] *Id.* at 2776-77 (Burger, C.J.).

[275] *Id.* at 2777 (Burger, C.J.) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18-21 (1971)).

Court's, and probably broader![276] In that one brief sentence the Chief Justice extended recognition of Congress' section 5 power even beyond that previously advanced in *Morgan*. While *Morgan* conceded to Congress the right to fashion remedies altering the balance of federalism and exceeding the Court's application of equal protection, it did not involve the distribution of any burden on the basis of race. *Morgan* had allowed the "enforcement," using Justice Brennan's section 5's term, of the right to vote, not the "remedying" of underinclusion in voting or in public works contracts by quota. While Chief Justice Burger was undoubtedly correct in declaring Congress' remedial power to be at least equal to that of the Court under *Swann*, that conclusion was truly unprecedented.

Justice Marshall, joined by Justices Brennan and Blackmun, concurred on the ground that discrimination which is benign rather than stigmatizing may be upheld by a showing of "an important and articulated purpose for its use."[277] Thus, the concurring Justices relied on an intermediate standard of review for benign discrimination, rather than on the uniqueness of Congress' section 5 power. Although Justice Marshall and those joining him were faithful to their *Bakke* positions, which gave benign discrimination a favored place in equal protection analysis, it cannot be assumed that they opposed the extension of *Morgan* announced by the Chief Justice. On the contrary, Justice Brennan, at least, might be expected to reiterate his earlier views in an appropriate future case.

*Fullilove* is, at this writing, the latest word on section 5 and benign discrimination. Together with *Bakke* and *Weber* it completes a typology of benign discrimination programs—voluntary private programs, state imposed programs and federally imposed programs. Under the analysis suggested here, supported in part by Chief Justice Burger's opinion in *Fullilove*, each must be accorded different treatment. The result is simple. Racial classifications by a state or its agencies will continue to be judged by the strict scrutiny, compelling state interest standard that has evolved since *Korematsu*,[278] whether or not the discrimination is allegedly benign. Private benign discrimination, as in *Weber*, is permissible, unless Congress has chosen to prohibit it. Both Congress and the Court may determine the need for remedial programs and authorize such benign discrimination as is necessary through appropriate legislation directed at either states or private parties. Such pieces of legislation, as were involved in *Fullilove*, for example, are not subject to conventional equal protection analysis, but can be reviewed by the

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[276] 100 S. Ct. at 2777 (Burger, C.J.).
[277] *Id.* at 2795-96 (Marshall, J., concurring) (citing *Bakke*, 438 U.S. at 361).
[278] *See* notes 20-22 & accompanying text *supra*.

*M'Culloch* standard appropriate for section 5 and by the fairness standard for due process set forth in *Bolling v. Sharpe*.[279]

*Further Applications of Section 5*

The current controversy over reverse discrimination centers on its use in two areas: education and employment. Both areas are dealt with in the Civil Rights Act of 1964.[280] *Weber* has, for the time being, definitively resolved the employment issue, holding that Title VII permits private employers to elect benign discrimination. In education, however, *Bakke*, because it avoided a direct analysis of Congress' power, has shed little light on the permissible uses of benign discrimination. Furthermore, education presents the problem of creating a uniform standard for public and private educational institutions, since both perform the same function, often in competition with one another. Doing so rules out voluntary implementation of benign discrimination, as in *Bakke*, for, as argued here, absent any federal judicial or legislative directives, state and local governments are bound to a color-blind application of the fourteenth amendment. The answer may lie, then, in the interpretation and administration of Title VI of the Civil Rights Act of 1964.

In education, Title VI,[281] which was the focus of *Bakke*, is more relevant to the question of reverse discrimination than is Title IV,[282] which deals with the desegregation of public education. Title IV defines "desegregation" to exclude the assignment of students to overcome racial imbalance.[283] Thus, it is unlikely that any regulation under Title IV could legitimately encompass reverse discrimination. However, Title VI is, as *Bakke* proves, open to construction as to the meaning of "discrimination," its central term.[284] In arguing that voluntary reverse discrimination programs did not violate Title VI, Justice Brennan relied to a great extent on two particular regulations issued pursuant to section 602 of Title VI.[285] One of these regulations provides for "affirmative action to overcome the effects of prior discrimination"[286] and the other provides for "affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race"

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[279] *See* notes 31-33 & accompanying text *supra*.
[280] 42 U.S.C. §§ 2000a-2000h (1976).
[281] *Id.* § 2000d.
[282] *Id.* § 2000c.
[283] *Id.* § 2000c(b).
[284] *See* notes 249-55 & accompanying text *supra*.
[285] 438 U.S. at 341-47 (Brennan, White, Marshall & Blackmun, JJ., concurring & dissenting in part).
[286] 45 C.R.F. § 80.3(b)(6)(i) (1977).

even absent "prior discrimination."[287] Justice Brennan found that these regulations, especially the latter, were sufficient to support the legality of the defendant's program in light of implicit congressional approval of HEW's interpretations.[288]

Clearly, then, HEW believes that it has the authority to permit "affirmative action" under Title VI, and four Justices agree. All that seems to be necessary is a conversion of the open-ended approach of HEW's current regulations into a structured administrative program such as that Justice Powell expressly approved in recapitulating *UJO*.[289] If HEW has the authority to permit voluntary affirmative action, surely it has the authority to require that such programs meet specific criteria or be submitted to it. An exhaustive review of the legislative history of the Civil Rights Act of 1964 is beyond the scope of this article and, as *Bakke* illustrates, likely to be an exercise in futility.[290] However, what is important for this discussion is that HEW has the apparent authority to authorize and regulate programs of reverse discrimination or affirmative action, and, given appropriately structured administrative procedures, a majority of the present Supreme Court is likely to sustain such administrative action.

## CONCLUSION

Equal protection analysis is in chaos. The Supreme Court is divided over the appropriate application of equal protection doctrine to reverse discrimination or to the emerging claims of such non-racial groups as women and illegitimates. The two-tier equal protection test developed by the Warren Court is no longer capable of resolving these problems, while Justice Marshall's intermediate level of review remains unpersuasive. This article has argued that Congress, not the Court, is the proper forum for resolving the question of the limits of equal protection.

Section 5 of the fourteenth amendment, along with the second sections of the thirteenth and fifteenth amendments, is a unique delegation of enforcement power to Congress. Since its conception, section 5 has been viewed as the potential source of a major alteration of the relationship between Congress, the Court and the states.[291] Although the

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[287] *See id.* § 80.3(b)(6)(ii).

[288] 438 U.S. at 343-50 (Brennan, White, Marshall & Blackmun, JJ., concurring & dissenting in part).

[289] *Id.* at 305 ("[U]nlike *Lau* and *United Jewish Organizations*, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts.").

[290] *Weber*, in demonstrating the willingness of the Court to interpret the Civil Rights Act of 1964 in a manner compatible with discrimination, underscores the potential of a statutory approach to the *Bakke* problem.

[291] *See* note 43 *supra*.

Court's early decisions resulted in a narrow limitation on Congress' section 5 power, *Katzenbach v. Morgan*[292] and the other cases decided in the fall 1965 term[293] revitalized section 5 as a basis for congressional action redressing racial discrimination.

The key issues confronting an expansive view of Congress' section 5 power are the so-called "ratchet" problem,[294] the problem of judicial review and the constraints of federalism. The position taken here is that the ratchet problem is best addressed in jurisprudential terms; that is, by acknowledging that the concept of equal protection has a central, or core significance, as well as a discretionary, or penumbral, significance. It is in the penumbral area, beyond *de jure* racial discrimination against blacks, that Congress may substantively define the application of equal protection.

The problem of judicial review has been mischaracterized. The issue is not really whether there shall be judicial review, but rather, what the scope and standard of that review shall be. This article has argued that the Court erred in evaluating Congress' section 5 enactments by the Court's method of equal protection analysis. It has suggested, instead, that Congress' section 5 power is subject to the same standard of review as its other powers—the flexible standard of *M'Culloch* and the requirements of fifth amendment due process. Furthermore, the identification of the fifth amendment standard with the fourteenth amendment standard of equal protection is demonstrably incorrect.[295] Thus Congress is bound neither by the compelling state interest standard nor by minimum rationality, but rather by an intermediate standard centered on the due process concept of fundamental fairness or, in the words of Chief Justice Burger, to remedial actions narrowly tailored to combat the present effects of past discrimination.[296]

Federalism may be the easiest issue of all to resolve. It is increasingly accepted that Congress has the power to determine the issue of federalism in deciding how far to exercise its powers.[297] Thus, the Court's role is limited to defining the nethermost reaches of Congress' power. Within that limit, Congress decides the federalism question. *Weber* and *Fullilove* implicitly support this view. The result of this analysis is to grant to Congress the power to determine the constitutionality of reverse discrimination. Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting

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[292] 384 U.S. 641 (1966).

[293] United States v. Guest, 383 U.S. 745 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[294] Cohen, *supra* note 91.

[295] *See* notes 31-48 & accompanying text *supra*.

[296] *See* Fullilove, 100 S. Ct. at 2777 (Burger, C.J.).

[297] *See* text accompanying note 202 *supra*.

alone. Section 1 may well require the states to conform to a color-blind standard; section 5 grants Congress the power to determine what deviation from that standard is appropriate.

Finally, this article has argued that the Civil Rights Act of 1964 provides the necessary basis for regulatory administration of benign or reverse discrimination programs in education, despite *Bakke*'s ambiguity. HEW is empowered to promulgate regulations authorizing voluntary programs of reverse discrimination directed against existing racial imbalances, provided that such plans are either formally submitted to that agency for its review and consent, or meet the criteria established by it.

The virtue of this analysis is its recognition that the difficult issues of discrimination and the redress thereof are far more amenable to political determination than judicial construction. At the same time, there is abundant historical, textual and judicial support for giving Congress a primary role in deciding these questions. *Fullilove* may be the latest word on Congress' section 5 power, but it is doubtful that it will be the last.